Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

(12)

No. 98-5881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BENJAMIN LEE LILLY,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is the declaration against penal interest a firmly-rooted exception to the hearsay rule under *Ohio* v. *Roberts*?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

The present case presents this Court with the chance to recognize the changes in the law that have taken place since *Bruton* v. *United States*, 391 U. S. 123 (1968). Declarations against penal interest are now a firmly rooted exception to the hearsay rule. Therefore, codefendant confessions can now be admitted to inculpate defendants, reducing the need for *Bruton*.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

Allowing wider use of voluntary, probative, reliable confessions furthers the interests of truth and justice. Such a result is consistent with the interests of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Gary Barker, the state's principal witness against defendant, shared a room with Mark Lilly, the brother of defendant Benjamin Lilly. *Lilly* v. *Commonwealth*, 499 S. E. 2d 522, 528 (Va. 1998). Barker testified that the day before the murder, he, defendant, and Mark Lilly were at defendant's home smoking marijuana and " 'drinking.' " They decided to go to a friend's house to " 'drink a little bit with him.' " After they discovered that the friend was not home they broke into the house, stealing liquor, a safe, and several guns. They subsequently broke open the safe, dividing the contents. *Ibid.*

The three continued their crime spree the next day. At a convenience store parking lot in Heathwood, Virginia, they abducted Alexander DeFilippis and stole his car. They drove to a remote area by the bank of the New River, near Whitethorne where defendant shot DeFilippis four times with the stolen pistol, killing him. *Ibid.*

The three continued their crime spree of robbing small stores until DeFilippis' car broke down. As the three removed stolen merchandise from the car, the police arrived. The three fled on foot with Barker and defendant being captured almost immediately. *Id.*, at 529. While in the police car, defendant asked Police Chief Whitsett to put his shotgun in defendant's mouth and pull the trigger. Whitsett declined, asking defendant, " 'if I looked like a murderer?' " *Ibid.* Replying to a comment made by defendant, Whitsett asked next " 'what does a murderer look like anyway?' " Defendant replied, " 'me.' " *Ibid.*

Barker and Mark Lilly both gave statements to the police. *Ibid.* Before giving his statement, Mark Lilly was informed that Barker and defendant had stated that he had not committed the killing. Petitioner's Brief 6. Mark Lilly's initial statement "did not mention the murder and maintained that the other two men

had forced him to commit the robberies." *Lilly*, 499 S. E. 2d, at 529. Mark Lilly stated that he only wanted to steal liquor from defendant's friend, not the guns. *Id.*, at 533. He also directly implicated defendant as the instigator of the carjacking and the triggerman in the killing, claiming that he and Barker " 'didn't have nothing to do with the shooting [of DeFilippis].' " *Ibid.*

At defendant's trial, Mark Lilly invoked his self-incrimination privilege, and his statement was admitted as a declaration against penal interest. *Ibid.* Defendant was indicted for and convicted of abducting and robbing DeFilippis, carjacking, murder in the course of a robbery, using a firearm in the principal offense, and being a felon in the possession of a firearm. *Id.*, at 527-528. He was sentenced to death for the capital murder and 27 years for the lesser charged offenses. *Id.*, at 528. The Virginia Supreme Court affirmed his conviction and sentence. *Id.*, at 538. The court rejected defendant's Confrontation Clause objection to Mark Lilly's statement, holding the that statement of an unavailable witness made against penal interest is a "firmly rooted" exception to the hearsay rule. *Id.*, at 534.

After defendant's trial, Mark Lilly pled guilty to first-degree murder, and received a 49-year sentence. Petitioner's Brief 7.

SUMMARY OF ARGUMENT

None of this Court's decisions have categorically disqualified the penal interest exception under the Confrontation Clause. The analysis of *Bruton* v. *United States* is colored by the fact that when it was decided, declarations against penal interest were generally inadmissible. This same feature is present in the Court's most recent confrontation case, *Gray* v. *Maryland*. *Cruz* v. *New York* was simply an application of *Bruton*'s logic and underlying assumptions to the problem of interlocking confessions.

Lee v. *Illinois* must be read in light of the statement it rejected. Because the statement was apparently self-serving and motivated by revenge it was not against declarant's interest. *Lee* only recognizes that such statements cannot qualify under the Confrontation Clause.

Williamson v. *United States* demonstrates that the status of declarations against penal interest under the Confrontation Clause is still undetermined. The fact that all members of this Court were willing to consider that such evidence is admissible under some circumstances demonstrates how much the law has changed since *Bruton*.

Under *Ohio* v. *Roberts*, firmly rooted exceptions to the hearsay rule satisfy the Confrontation Clause. Declarations against penal interest fall within one such exception. Their initial exclusion from the declarations against interest exception was based on a misreading of the law by the House of Lords. This archaic view violates common sense. Justice Holmes, Dean Wigmore, and others demonstrated that people generally do not incriminate themselves lightly, and are thus unlikely to lie when they do so. The Holmes-Wigmore view has carried the day, as the declaration against penal interest exception is observed by most jurisdictions. This extends to the inculpatory use of the penal interest exception, which is now recognized by many jurisdictions.

The standard argument against the admissibility of this evidence, that the declarant has a motive to incriminate others, can and has been addressed by the courts. The most likely motives to cause one to falsely inculpate another are currying favor, revenge, and exculpation. The first motive can be found by courts, and is minimized by the giving of *Miranda* v. *Arizona* warnings. Where the declaration is not made in custody, or where there has been no promise of leniency and the declarant was read his *Miranda* rights, there is no reason to suspect that the statement is an attempt to curry favor.

The fact that a particular type of hearsay evidence can qualify as a firmly rooted exception does not end the inquiry, as courts must still decide whether the particular piece of hearsay is fairly included within the exception. This Court's interpretation of the federal hearsay exceptions should not govern the *Roberts* rule. Tying *Roberts* to this Court's federal evidence decisions will effectively stifle innovation in this field, contrary to *Roberts* and other Confrontation Clause decisions.

The decision of the Virginia courts to admit Mark Lilly's statements as a declaration against penal interest was proper. A key to the reasonableness of this decision is the fact that Mark

Lilly was informed that his two cohorts cleared him of personally committing the killing. This distinguishes the present case from the unreasonable application of the penal interest exception found in *Lee*. Mark Lilly's understanding that he was in the clear for the murder, other than felony-murder liability as an accomplice to the robbery, provides the context that demonstrates that his statement was strongly self-incriminatory, and thus reasonably within the penal interest exception under *Roberts*.

ARGUMENT

I. Whether a declaration against penal interest satisfies the Confrontation Clause is an open issue.

Although the use of one's confession to inculpate an accomplice has led to the reversal of convictions by this Court, the practice has not been categorically banned under the Confrontation Clause. Instead, the decisions rejecting such evidence have either assumed such evidence to be inadmissible, as in the most recent Confrontation Clause decision, see *post*, at 7-8, or have dealt with a statement that was not truly against the declarant's penal interest. The validity of declarations against penal interest under the Confrontation Clause is demonstrated by both the federal penal interest rule, Federal Rule Evid. 804(b)(3), and its interpretation in *Williamson* v. *United States*, 512 U. S. 594 (1994).

This case differs from this Court's previous cases analyzing the constitutionality of the inculpatory use of confessions by an unavailable accomplice. These cases, beginning with *Bruton* v. *United States*, 391 U. S. 123 (1968), dealt with a codefendant's confession that also incriminated the other defendant. Although the present case is factually distinguishable as the confessing third party pled guilty in a subsequent proceeding, see *supra*, at 3, the earlier cases contain language that is capable of being misconstrued to prevent the admissibility of declarations against penal interest. These decisions must be addressed in order to prevent them from distorting the law of evidence through a misinterpretation of the Confrontation Clause.

The most famous decision to reject accomplice confessions, *Bruton* v. *United States* (1968) 391 U. S. 123, dealt with a hearsay statement against penal interest that was inadmissible as a matter of federal law at that time.

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence .... There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we *intimate no view whatever* that such exceptions necessarily raise questions under the Confrontation Clause." *Id.*, at 128, n. 3 (emphasis added).

The *Bruton* Court attacked the confession's inculpatory effect on the nonconfessing defendant. "Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect ...." See *id.*, at 136. This statement must be read in the context of its inadmissibility with respect to defendant.[2] The inherent suspicion accorded accomplice testimony is substantially a product of history; in many circumstances accomplice testimony is now given more credence than when *Bruton* was decided. See Part II B, *post*. This development in the law of evidence irrevocably alters the interpretation of the Confrontation Clause.

Bruton's considerable hostility towards hearsay now looks outdated. Modern research casts doubt on *Bruton*'s characterization of third party confessions as "devastating to the defendant." Mock jury studies have found that jurors do not overvalue hearsay testimony. See Miene, Park & Borgida, Juror Decision Making and the Evaluation of Hearsay Evidence, 76 Minn. L. Rev. 683,

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2. *Douglas* v. *Alabama*, 380 U. S. 415 (1965) is distinguishable for similar reasons. Douglas' accomplice Loyd, who had signed a written confession, had been tried separately and convicted. *Id.*, at 416. He was called to testify at Douglas' trial while his appeal was still pending, and invoked his self-incrimination privilege each time he was asked about the crime. *Ibid.* Loyd was then declared a hostile witness and his confession, which implicated Douglas, was read to him in the form of a series of questions. This evidence was inadmissible against Douglas under Alabama law, but the state appellate court held that Douglas waived his rights because he had "stopped objecting." *Id.*, at 418. Since Loyd could not be cross-examined on this inadmissible evidence, the Court held that Douglas' confrontation rights were violated. See *id.*, at 419-420.

699 (1992). Adding hearsay evidence to circumstantial evidence increased the conviction rate by only four percent, while adding hearsay to eyewitness testimony actually lowered the conviction rate by seven percent. *Ibid.* In another study comparing evaluations of eyewitness and hearsay testimony

> "the results suggest that in general, jurors are skeptical of the quality and usefulness of hearsay testimony. More specifically jurors in this study were able to differentiate between accurate and inaccurate hearsay witnesses." Kovera, Park, & Penrod, Jurors' Perceptions of Eyewitness and Hearsay Evidence, 76 Minn. L. Rev. 703, 722 (1992).

The greater risk of misleading jurors came from eyewitness testimony, not hearsay. *Ibid.* Although criminology cannot explain away the Confrontation Clause, since the clause is premised on preserving the accuracy of factfinding, see *United States* v. *Inadi*, 475 U. S. 387, 396 (1986), interpretations of the clause should take this modern research into account. Accomplice confessions are now less likely to be "devastating" when presented to modern juries.

Gray v. *Maryland*, 523 U. S. __, 140 L. Ed. 2d 294, 118 S. Ct. 1151 (1998), the most recent application of *Bruton*, also presupposes that the codefendant's confession was inadmissible against the defendant. Like *Bruton*, *Gray* also involved an out-of-court confession that incriminated both the declarant and the defendant. See *id.*, at 298, 118 S. Ct., at 1153. Defendant and the declarant were tried jointly as codefendants, and the confession was admitted against the declarant Bell, with all references to defendant's or another accomplice's name replaced with the words "deleted" or "deletion." See *ibid.* Maryland's high court held that this did not violate Gray's confrontation rights and reinstated his murder conviction after an intermediate appellate court had set it aside. *Id.*, at 299, 118 S. Ct., at 1153; see *State* v. *Gray*, 687 A. 2d 660, 669 (Md. 1997).

This Court reversed, holding that this method of redacting defendant's name did not satisfy the *Bruton* standard. See *Gray*, *supra*, 140 L. Ed. 2d, at 304, 118 S. Ct., at 1157. The *Gray* decision did not decide whether hearsay admitted as a declaration against penal interest could satisfy the Confrontation Clause. The decision that the confession was rendered inadmissible against

defendant began at the trial court, which granted Gray's motion to remove his name from the confession. See *State* v. *Gray*, *supra*, 687 A. 2d, at 662. Since Bell's confession was never meant to incriminate Gray, *Gray* was no more than an application of *Bruton*'s damage control mechanism—it did not decide whether such confessions always unconstitutionally damaged defendant's interest in effective confrontation.

Gray's analysis of the hearsay confession is best understood in this context. When the decision states that the " 'out of court accusation' [citation] creates a special, and vital, need for cross-examination," *Gray*, *supra*, 140 L. Ed. 2d, at 302, 118 S. Ct., at 1156 (quoting *Bruton*, *supra*, 391 U. S., at 138 (Stewart, J., concurring)), the prejudicial effect of the confession is a given, as in *Bruton*. Whether the need for cross-examination vanishes for a confession admitted as a declaration against penal interest was not decided in *Gray*.

Other decisions applying the penal interest exception note *Bruton*'s limits. "The Court's ruling [in *Bruton*], however, was predicated upon the *inadmissibility* of the statement against the defendant under the rules of evidence . . . ." *United States* v. *York*, 933 F. 2d 1343, 1362 (CA7 1991) (emphasis in original); *United States* v. *Kelley*, 526 F. 2d 615, 620 (CA7 1975); see also Haddad & Agin, A Potential Revolution in *Bruton* Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use, 81 J. Crim. L. & Criminology 235, 239 (1990) ("A common misconception is that *Bruton* interpreted the Confrontation Clause so as to prohibit the use of a codefendant's confession or admission as evidence against a defendant"). *Bruton* did not expand the Confrontation Clause and should not be expanded to limit the evidence in the present case.

Cruz v. *New York*, 481 U. S. 186 (1987) applies *Bruton* to a narrow issue left unresolved in *Parker* v. *Randolph*, 442 U. S. 62 (1979), "whether *Bruton* applies where the defendant's own confession, corroborating that of his codefendant, is introduced against him." 481 U. S., at 188. In *Parker*, the plurality held that when the defendant's and codefendant's confessions confirmed each other, or "interlocked," the codefendant's confession, "will

seldom, if ever, be of the 'devastating' character referred to in *Bruton* . . . ." 442 U. S., at 73. Justice Blackmun, concurring, disagreed with the plurality's reasoning, but found that an interlocking confession could render the Confrontation Clause error harmless. See *id.*, at 80-81. Therefore, *Bruton* was unnecessary as the right of cross-examination "has far less practical value to a defendant who has confessed to a crime than to one who has consistently maintained his innocence." *Ibid.*

Cruz rejected this reasoning in a continuation of the assumptions and logic underlying *Bruton*:

> "While 'devastating' practical effect was one of the factors that *Bruton* considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U. S., at p. 136, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' codefendant confessions that 'interlock' with the defendant's own confession." *Cruz*, *supra*, 481 U. S., at 191-192.

As *Cruz* was an application of *Bruton*'s analysis, it had to take as a given *Bruton*'s assumption that a defendant's statements against penal interest were generally inadmissible to inculpate a codefendant. See *id.*, at 189 (jury instructed not to consider the statement against Eulogio Cruz, but only against codefendant/declarant Benjamin Cruz); *id.*, at 193 (holding based on premise that confession "is not directly admissible against the defendant"). The *Cruz* Court did, however, recognize that if this proposition did not hold in certain cases, then *Bruton* would be inapplicable. The *Cruz* Court noted that while the interlocking property of confessions was irrelevant to "*harmfulness*" it was relevant to "*reliability*." See *id.*, at 192-193 (emphasis in original). While an interlocking confession cannot make admissible a confession that is not directly admissible, it can at least be part of the "indicia of reliability," to determine whether the codefendant's confession is

"directly admissible against [the defendant], . . . despite the lack of opportunity for cross-examination . . . ." *Id.*, at 193-194.

Cruz, like the other *Bruton* cases, is not about the admissibility of confessions, but on the capacity of curative instructions to overcome the prejudicial effect of a confession whose inadmissibility against defendant is a given. When a confession is "not directly admissible against defendant" the only issue is whether the Confrontation Clause is violated "even if the jury is instructed not to consider it against the defendant . . . ." *Id.*, at 193.

Lee v. *Illinois*, 476 U. S. 530 (1986) leaves unanswered the question left open in *Bruton*. *Lee* involved a confession implicating an accomplice that was made under particularly suspicious circumstances. Lee was at the police station in order to identify a badly burned body found in the housing complex in which she lived. *Id.*, at 532. A detective became suspicious when she started to cry as she examined photographs of the body. He read Lee her *Miranda* warnings, and asked her about her missing aunt. Lee eventually admitted that she and her boyfriend, Edwin Thomas, were involved in the stabbing of Lee's Aunt Beedie and her friend Odessa Harris, and that the body was her aunt's. *Ibid.* Lee was arrested and signed a written confession. *Ibid.* In her confession, Lee claimed that Thomas alone killed Odessa by stabbing her in the back, while she killed Aunt Beedie under circumstances strongly suggesting self-defense or a homicide less culpable than murder. See *id.*, at 533-534.

Thomas arrived at the police station as Lee was being interrogated. *Id.*, at 532. Lee had inculpated him enough by that point, however, that the officers advised Thomas of his *Miranda* rights, and then accused him of participating in the murders. *Ibid.* Thomas then stated that " 'he wanted to think about' talking to the police." *Ibid.*

After Lee finished confessing, the police allowed the lovers to meet. As the two kissed and hugged, an officer "asked Lee, in the presence of Thomas, 'what was the statement you had just given us implicating Edwin?' " *Id.*, at 532-533. After Lee told Thomas that he had said to her that " 'we wouldn't let one or the other take the rap alone,' " Thomas decided to talk. *Ibid.* His statement spread the blame, painting Lee as an active planner and participant in the murders. See *id.*, at 535. The two were tried jointly without

a jury, and both confessions were used against the defendants. See *id.*, at 536-537. The trial judge relied on Thomas' confession for finding Lee guilty of both murders. *Id.*, at 538.

The *Lee* Court rejected the contention that Thomas' confession came under an established hearsay exception.

> "We reject respondent's categorization of the hearsay involved *in this case* as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as a confession by an accomplice which incriminates a criminal defendant." *Id.*, at 544, n. 5 (emphasis added).

Footnote five must be read in the context of the evidence it rejected. The *Lee* Court had strong reason to doubt the veracity of Thomas' statements, which effectively shifted the blame to Lee. It noted from the facts that Thomas may well have had a desire to fabricate his story out of retaliation against Lee or in order to spread the blame. *Id.*, at 544. This "theoretical motive" was backed up by the fact that "Thomas contemplated becoming a witness for the State against Lee." *Ibid.*

In light of Thomas' strong motive to implicate Lee, his statement is thus best viewed as not being a true declaration against Thomas' penal interest. See *id.*, at 544-545. Simply because some of Thomas' statements may have tended to incriminate him did not render it against his penal interest for the purpose of the hearsay exception. To label Thomas' dubious, blame-spreading statement as against his penal interest "defines too large a class for meaningful Confrontation Clause analysis." *Id.*, at 544, n. 5. *Lee* only disapproved of an improper use of the penal interest question. The fate of a proper use of this rule is still undetermined.

This conclusion is reinforced by *Williamson* v. *United States* (1994) 512 U. S. 594. In *Williamson*, Reginald Harris was arrested after a stop and search of his car yielded 19 kilograms of cocaine in two suitcases in the trunk. *Id.*, at 596. Soon after the arrest, Harris was interviewed over the telephone by Special Agent Walton of the Drug Enforcement Agency. *Ibid.* Harris told Agent Walton that he received the cocaine from an unidentified Cuban in Fort Lauderdale, but that it actually belonged to Williamson and

was to be delivered to a particular dumpster that night. *Ibid.* Harris subsequently fleshed out this story in a personal interview with Agent Walton. See *ibid.*

As Agent Walton started to arrange a controlled delivery of the cocaine, Harris changed his story. Harris said that he had lied about the Cuban and other details. *Id.*, at 597. Harris said that the truth was that he was transporting the cocaine to Atlanta for Williamson, who had been traveling in front of Harris in a rental car. Williamson, therefore, had seen Harris' car being searched by police, making a controlled buy impossible. See *ibid.*

Harris said that he lied because he feared Williamson. He did not want his story recorded, and refused to sign a written version of his confession. Walton testified that he made no promise of help to Harris other than reporting any cooperation to the Assistant United States Attorney. See *ibid.*

Harris refused to testify at trial, even after being given immunity and compelled by a contempt order. Therefore, the trial court allowed Agent Walton to relate Harris' story as a statement against penal interest, Federal Rule of Evidence 804(b)(3). See *Williamson*, *supra*, 512 U. S., at 597. The Court of Appeals affirmed Harris' conviction against a Confrontation Clause attack. *Id.*, at 598.

In a partially divided opinion, the *Williamson* Court established the scope of Rule 804(b)(3). A majority of the Court held that in order to qualify as a statement against penal interest under the federal Rules, the statement must be truly inculpatory; collateral statements would not qualify for the hearsay exception, even if linked to other self-inculpatory statements. See *id.*, at 600-601. The majority split over how to apply this holding to the case before the Court. Four of the six justice majority saw Harris' statement as inadmissible on its face as "Harris' arguably inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy," *id.*, at 608 (Ginsburg, J., concurring in part and concurring in the judgment), but would remand the case for harmless error analysis. *Id.*, at 610. The remaining members of the majority held that the case should be vacated and remanded for further findings on whether Harris' statements were "truly self-inculpatory." See *id.*, at 604 (opinion of O'Connor, J.). The three remaining justices took a broader

approach to Rule 804(b)(3) and would allow in some noninculpatory collateral statements. See *id.*, at 620 (Kennedy, J., concurring in the judgment). This concurrence would remand the case for analysis under its standard. *Id.*, at 621.

Although this case did not reach the Confrontation Clause issue, see *id.*, at 605 (opinion of O'Connor, J.), the part of the lead opinion not joined by a majority of the Court hints that statements against penal interest may sometimes inculpate third party defendants without violating the Confrontation Clause.

> "We note, however, that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Ibid.* (citing *Lee*, *supra*, 476 U. S., at 543-545).

This statement left undecided the question of whether the declaration against penal interest exception "is 'firmly rooted' for Confrontation Clause purposes." *Ibid.*

Neither of the other opinions generally banished statements against penal interest under Confrontation Clause grounds. Justice Ginsburg's concurrence did cite Confrontation Clause precedents in support of the assertion that statements implicating others have trustworthiness and Confrontation Clause problems. See *id.*, at 608. These concurring justices formed the part of a majority opinion that at least contemplated admitting such statements against codefendants. See *id.*, at 603 (majority). While Justice Kennedy's concurrence does not address the Confrontation Clause, the fact that it takes a broader view than the majority of what is admissible under the penal interest exception, see *id.*, at 616 ("the conclusion reached by the Court today—would 'eviscerate the against penal interest exception' "), strongly implies a willingness to admit at least some statements against penal interest over Confrontation Clause objections.

Williamson did not fix the relationship between statements against penal interest and the Confrontation Clause. This Court was confronted with a statement that in some ways looked even less credible than the one summarily rejected in *Lee*. The confession in *Lee* implicated both defendants equally, see *supra*,

at 10; the confession in *Williamson* portrayed Harris as a little fish acting under the direction of the much larger catch, Williamson. See *supra*, at 12. Harris' confession contradicted an earlier one he made on several key points, and he refused to make a written statement of it. See *supra*, at 12. In spite of this, a majority of this Court was willing to consider the possibility that Harris' unredacted statement was still admissible. See *Williamson*, *supra*, 512 U. S., at 604 (O'Connor, J.); *id.*, at 621 (Kennedy, J., concurring).

This is a very far distance traveled from a *Bruton* opinion which abruptly dismissed similar evidence in a footnote. See *supra*, at 6. *Williamson* and Rule 804(b)(3) reflect more than a change in federal evidence law. They represent the penal interest exception's coming of age.

II. An appropriately interpreted penal interest exception is sufficiently firmly rooted to satisfy the Confrontation Clause.

A. The Roberts Rule.

The seemingly straightforward language of the Confrontation Clause, U. S. Const., Amdt. 6 ("the accused shall enjoy the right . . . to be confronted with the witnesses against him"), creates a problem. Courts seem to have but one of two choices for the Confrontation Clause. At one extreme, the clause would prevent any hearsay testimony from being admitted against criminal defendants. The other approach distinguishes between witnesses and declarants, applying the Confrontation Clause only to actual witnesses against the defendant. See *Dutton* v. *Evans*, 400 U. S. 74, 94 (1970) (Harlan, J., concurring) (quoting 5 J. Wigmore, Evidence § 1397, p. 131 (3d ed. 1940)). Cross-examination of testimonial statements which are given " 'infra-judicially,' " such as dying declarations, would be governed by the law of evidence instead of the Constitution. See *ibid.* Resolving this question is made even more difficult by the relatively scant history concerning the framers' intent behind the words of the Confrontation Clause. See *id.*, at 95; *White* v. *Illinois*, 502 U. S. 346, 358-359 (1992) (Thomas, J., concurring).

This Court has resolved the hearsay dilemma by choosing a third way. It was impractical and unfair to ban a whole body of often trustworthy and highly probative evidence from the prosecution's arsenal. Thus, the Supreme Court rejects this approach, which "would abrogate virtually every hearsay exception, . . . as unintended and too extreme." *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980). Nor has it adopted the limited physical-confrontation approach. See *White*, *supra*, 502 U. S., at 352. Instead, the Court has found "success in steering a middle course among proposed alternatives" for the Confrontation Clause, *Roberts*, 448 U. S., at 68, n. 9, by examining the reliability of the hearsay statement. See *id.*, at 65-66. Therefore, hearsay testimony with sufficient "indicia of reliability" may be admitted against defendant under the Confrontation Clause. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972).[3]

This approach carries its own burdens. Because this middle way and the hearsay rule serve such similar interests, see *California* v. *Green*, 399 U. S. 149, 155 (1970), and have such similar roots, see *Dutton*, *supra*, 400 U. S., at 86, there is a danger that application of the Confrontation Clause decisions may in this manner subvert the development of the hearsay rule. See *id.*, at 86-87, n. 17 (plurality). Although close, the Confrontation Clause and the hearsay rule should not be and are not the same. The states are the primary enforcers of criminal law, see *Patterson* v. *New York*, 432 U. S. 197, 201 (1977), and their rules governing criminal trials should generally be left untouched by the federal Constitution. See *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). A case-by-case examination of the individual reliability of each hearsay statement admitted against a defendant would turn the hearsay rule into a quagmire. "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Roberts*, *supra*, 448 U. S., at

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3. This rule typically requires the witness to be unavailable. See *Roberts*, 448 U. S., at 65. Sometimes, however, unavailability does not have to be proven. See *id.*, at 65, n. 7. When the penal interest exception rule is at issue, the declarant will typically be unavailable by claiming the self-incrimination privilege. See *Lee* v. *Illinois*, 476 U. S. 530, 549, n. 3 (1986) (Blackmun, J., dissenting).

64. Turning the Confrontation Clause into a case-by-case statute for the hearsay rule frustrates these compelling interests.

Roberts addressed these concerns. In addition to allowing the state to prove the reliability of hearsay on a case-by-case basis, *Roberts* held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*, at 66.

This holding shines a light through the fog of the Confrontation Clause. Focusing on hearsay exceptions comports with how the hearsay rule is applied; a general rule against hearsay subject to numerous specific exceptions.[4] See, *e.g.*, Fed. Rules Evid. 802-804; 5 J. Wigmore, Evidence § 1366, pp. 28-29 (J. Chadbourn rev. 1974) (dividing hearsay rule into the rules requirements, its exceptions, nontestimonial utterances to which the rule does not apply, and applying the rule to statements of the tribunal).

The *Roberts* rule is respectful of, but not wedded to, history. A long-recognized exception is more likely to contain sufficient "indicia of reliability" to satisfy the Confrontation Clause. See *Mancusi*, *supra*, 408 U. S., at 213 (noting long acceptance of prior recorded testimony). Since the hearsay rule, like the Confrontation Clause, is motivated by accuracy, compare *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985) (purpose of Confrontation Clause to advance the accuracy of trials) with 5 Wigmore, *supra*, § 1362, at 3 (purpose of hearsay rule to test assertions of witnesses through cross-examination), common sense dictates that those exceptions which best promote accuracy will survive the test of time.

The Confrontation Clause does not, however, petrify the hearsay rule. "The confrontation clause is not just a codification of the rules of hearsay and their exceptions as they existed historically at common law." *People* v. *Farmer*, 47 Cal. 3d 888, 905, 765 P. 2d 940, 951 (1989) (plurality). The best description of the adaptability that is the essence of the Supreme Court's Confrontation Clause jurisprudence comes from *Roberts*. "True

4. The "catch-all" hearsay exception, see, *e.g.*, Fed. Rule Evid. 803(24), is not a firmly rooted exception under *Roberts*. See *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990) (rejecting "firmly rooted" status for equivalent state rule).

to the common-law tradition, the process has been gradual, building on past decisions, *drawing on new experience, and responding to changing conditions*." *Roberts*, *supra*, 448 U. S., at 64 (emphasis added). This is a necessity in a body of law as organic as the law of evidence. "The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law." *Donnelly* v. *United States*, 228 U. S. 243, 277-278 (1913) (Holmes, J., dissenting). Therefore, "[t]he Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay "exceptions." ' " *Roberts*, 448 U. S., at 64-65 (quoting *Green*, *supra*, 399 U. S., at 162).

This Court has upheld many of the hearsay exceptions against Confrontation Clause attack. One of its earliest confrontation cases upheld the dying declaration exception. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895); cf. Fed. Rule Evid. 804(b)(2). The Court has also upheld cross-examined prior testimony, see *Mancusi*, *supra*, 408 U. S., at 213-216; cf. Fed. Rule Evid. 804(b)(1), and the statement of a coconspirator made in furtherance of the conspiracy. See *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987); see also Fed. Rule Evid. 801(d)(2)(E).

A particularly informative example of what satisfies the *Roberts* rule is found in *White* v. *Illinois*, 502 U. S. 346 (1992). The *White* Court examined the " 'spontaneous declaration' " and " 'medical examination' " exceptions to the hearsay rule under the Confrontation Clause. *Id.*, at 348-349. In finding that the spontaneous declaration exception was firmly-rooted under *Roberts*, the *White* Court noted this exception had a long history and was broadly accepted. See *id.*, at 355, n. 8. The medical examination exception was also firmly rooted as it was "similarly recognized in Federal Rule of Evidence 803(4) and is equally widely accepted among the states." *Id.*, at 356, n. 8. This passage is most important in what it does not contain. Neither history nor a detailed analysis of the medical examination exception's trustworthiness justified its acceptance. The simple fact of its acceptance under both state and federal rules was enough to justify an exception with few common law roots, which was essentially created by the Federal Rules of Evidence. See Friedman, Confrontation: A Search for Basic Principles, 86 Geo. L. J. 1011,

1019-1020 (1998). This stands in sharp contrast to the more aggressive analysis found in *Lee* v. *Illinois*, 476 U. S. 530 (1986). See Friedman, 86 Geo. L. J., at 1019. Now, "a synonym for 'firmly rooted' it seems, is 'in the Federal Rules of Evidence.' " *Id.*, at 1020.

The one commonly recognized exception that does not satisfy *Roberts* is the residual exception for statements not covered by a specific exception that has "equivalent circumstantial guarantees of trustworthiness." Fed. Rules Evid. 803(24). In *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990), this Court came to the necessary conclusion that this broad, unspecific standard could not be "a firmly rooted hearsay exception for Confrontation Clause purposes."[5] Unlike a standard hearsay exception, which

> "satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements," *ibid.*,

the residual exception embodied a very different purpose.

> "The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Ibid.*

Because this exception is so diffuse, if the Court were

> "to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take." *Id.*, at 817-818.

This Court's interpretation of the Confrontation Clause examines hearsay exceptions through a combination of common sense and a respect for the collective wisdom of legislatures and the courts, consistently with the "common-law tradition . . . ." *Roberts*, *supra*, 448 U. S., at 64. As the next section will demonstrate, declarations against penal interests are now part of that tradition. The rationale behind the exception makes sense, and its common sense is reflected in the many jurisdictions that accept this rule. It is time for this Court to admit declarations against penal interest into the family of firmly rooted hearsay exceptions.

5. *Wright* dealt with Idaho's residual hearsay exception which was taken nearly verbatim from the Federal Rules of Evidence. See 497 U. S., at 811-812; Idaho Rule Evid. 803(24).

B. The Firmly Rooted Exception.

The law of evidence has now evolved to the point that statements against penal interest can be considered a "firmly rooted" exception to the hearsay rule under *Roberts*, 448 U. S., at 66. The sheer common sense of the proposition that people rarely falsely incriminate themselves is a strong argument for its general acceptance, as Justice Holmes so eloquently explained:

> "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. —The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man (*Mattox* v. *United States*, 146 U. S. 140); and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length." *Donnelly* v. *United States*, 228 U. S. 243, 277 (1913) (Holmes, J., dissenting).

The declaration against interest exception, like most other exceptions to the hearsay rule, developed in the early eighteenth century. 5 J. Wigmore, Evidence § 1455, p. 323 (J. Chadbourn rev. 1974). The "arbitrary limit" of this rule to exclude statements against penal interests came about in a poorly reasoned decision of the House of Lords limiting the rule to statements against pecuniary or proprietary interest. See *id.*, at 351; *Sussex Peerage Case*, 11 Cl. & F. 85, 111-114, 8 Eng. Rep. 1034, 1044-1046 (1844). Although this decision was contrary to previous interpretations of the rule, see Wigmore, *supra*, at 350-351, it was accepted in both England and the United States. See *id.*, at 351-352.

This policy was wrong from its inception.

> "Was the practice of excluding third-person confessions in criminal cases justified? It certainly could not be justified on the ground that an acknowledgment of facts rendering one liable to criminal punishment is less trustworthy than acknowledgment of a debt. The motivation for the exclusion was no doubt a different one, namely, the fear of opening the door to a flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false. This fear was based on the likely criminal character of witness and declarant, reinforced by the requirement that declarant must be unavailable, which made perjury easier to accomplish and more difficult to punish." 2 J. Strong, McCormick on Evidence § 318, p. 340 (4th ed. 1992).

The distinction from the other accepted hearsay exceptions was senseless.

> "This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it's notorious that some witnesses lie and that it is difficult to avoid being deceived by their lies." 5 Wigmore, *supra*, § 1477, at 358-359.

Wigmore and Holmes argued to admit statements against penal interest in the context of third-party confessions exonerating

criminal defendants. See *id.*, at 359; *Donnelly*, *supra*, 228 U. S., at 277 (Holmes, J., dissenting). There is no reason inherent to the Confrontation Clause to limit declarations against penal interest to those exonerating the accused. The Confrontation Clause is concerned with accuracy,[6] see *United States* v. *Inadi*, 475 U. S. 387, 396 (1986), and accuracy is a two-edged sword. If justice is due equally to the accused and accuser, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934), then so is accuracy.

The standard modern argument for excluding the inculpatory use of statements against penal interest is that, while under arrest, an accomplice has "strong motivation to implicate the defendant and to exonerate himself" and therefore any statements "about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, 391 U. S. 123, 141 (1968) (White, J., dissenting). While many potential declarations against penal interest may be made under this circumstance, even statements made in police custody may be sufficiently credible to satisfy the Confrontation Clause.

Three related motivations—currying favor, revenge, and exculpation—are most likely to cause someone to implicate another falsely while also implicating oneself. Currying favor from the authorities, a motive recognized by the drafters of Federal Rule 804(b)(3), see Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p. 790, and by the courts, see, *e.g.*, *Williamson* v. *United States*, 512 U. S. 594, 601 (1994), can

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6. *Amicus* ACLU's request to replace the current mode of Confrontation Clause analysis with one based on preventing testimonial statements which have not been cross-examined does not overcome the importance of accurate fact-finding to this Sixth Amendment right. This Court has already turned down a request by the United States to depart from its traditional interpretation of the right to confrontation in favor of an approach limiting the Clause to the prohibition of *ex parte* affidavits at trial against the defendant. See *White* v. *Illinois*, 502 U. S. 346, 352-353 (1992). This Court summarily dismissed any attempt to depart from the principles first described in *Mattox*. "We think that the argument presented by the Government comes too late in the day to warrant the reexamination of this approach." *Id.*, at 353. *Amicus* CJLF submits that the same rationale applies to the ACLU's proposal. If this Court is willing to overhaul its Confrontation Clause precedent, *amicus* CJLF submits that it should not settle for the solution proposed by the ACLU, but should instead carry out the complete reform advocated by the United States in *White*.

be identified and addressed by the courts. The requirement that suspects be informed of their rights before custodial interrogation, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), helps to minimize the threat. The *Miranda* warnings minimize such dangers by informing the suspect "that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Id.*, at 469.

Where a defendant has been informed of his rights, and no promises of leniency were made, there is no reason to exclude declarations against penal interest. See, *e.g.*, *Williamson*, *supra*, 512 U. S., at 620 (Kennedy, J., concurring in judgment); *United States* v. *Garcia*, 897 F. 2d 1413, 1421 (CA7 1990). Any problem with efforts to curry favor should therefore be easy to control.

Exculpation and revenge were found by this Court in *Lee* v. *Illinois*, 476 U. S. 530 (1986). The relative ease with which the *Lee* Court uncovered them demonstrates that these difficulties are controllable. The bare facts before the Court strongly intimated the unacceptable motives behind Thomas' confession.[7] Revenge was inferred from codefendant Thomas' knowledge that Lee had implicated him and that he had almost testified for the prosecution. See *id.*, at 544. Thomas' self-exculpatory motive was similarly inferable as the nature of his statement showed a desire to shift blame from himself alone to a shared blame with the person who implicated him. See *ibid.* Separating the hearsay chaff from the declaration against penal interest wheat in this manner is something that courts do routinely. See 2 Strong, *supra*, § 319, at 346, n. 21 (discussing cases).

With so strong a measure of common sense behind it, it is understandable that the declaration against penal interest is now a "firmly rooted" exception to the hearsay rule. The arguments of Wigmore and Holmes spread throughout the courts and legislatures, leading to a relaxation of the rule excluding declarations against penal interest. See *id.*, at 340-341. The penal interest exception is now recognized by the federal system, see Fed. Rule Evid. 804(b)(3), California, see Cal. Evid. Code § 1230, and by most of the other states. See 5 Wigmore, *supra*, § 1477, at 360-

7. For a detailed description of the facts in *Lee*, see *supra*, at 10-11.

362, n. 7; *id.*, at 622-626 (Supp. 1998). A small minority of the states adopting the exception have excluded statements offered against the defendant in a criminal case. See *id.*, at 622-626 (Arkansas, Indiana, Nevada, New Jersey, North Dakota, Vermont). These rules may have been adopted in the mistaken belief that such an exception is constitutionally required. The House added similar language to the federal rule at one point. See House Judiciary Committee's Note on Fed. Rule Evid. 804, 28 U. S. C. App., p. 791; cf. *supra*, at 8. The language was deleted in the Senate, which recognized the codification was unwise where the principle was "under development." See Senate Judiciary Committee's Note on Fed. Rule Evid. 804, 28 U. S. C. App., pp. 791-792.

The initial rejection of this exception by the House of Lords, and the initial decision of American courts to follow this accident of history, should not change the analysis. The *Roberts* rule and this Court's other Confrontation Clause cases are marked by a respect, but not reverence, for history. See *supra*, at 16-17. The Confrontation Clause is not meant to stifle needed reforms of the law of evidence with historical baggage.

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* [v. *Texas* (1965) 380 U. S. 400] has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Dutton* v. *Evans*, 400 U. S. 74, 86-87, n. 17 (1970) (plurality) (internal quotation marks omitted).

The journey from the *Sussex Peerage Case*, *supra*, to the modern penal interest exception is a needed reform that allows reliable evidence into the courtroom. The Confrontation Clause should not be invoked to squelch it.

Holmes and Wigmore made their strongest arguments for the penal interest exception as a method for exculpating a criminal defendant through an out-of-court confession by a third party.

See, *e.g.*, *Donnelly*, *supra*, 228 U. S., at 277 (Holmes, J., dissenting); 5 Wigmore, *supra*, § 1477, at 359-360. Like evidence law in general, the penal interest exception has changed over time. Many jurisdictions now willingly accept the inculpatory use of declarations against penal interest by third parties or codefendants as incriminating evidence against defendants. See, *e.g.*, *People* v. *Gordon*, 50 Cal. 3d 1223, 1252-1253, 792 P. 2d 251, 267-268 (1995); *United States* v. *Trenkler*, 61 F. 3d 45, 61-62 (CA1 1995); *United States* v. *Casamento*, 887 F. 2d 1141, 1170-1171 (CA2 1989); *United States* v. *Alvarez*, 584 F. 2d 694, 701 (CA5 1978) (admissible with sufficient corroborating evidence); *Curro* v. *United States*, 4 F. 3d 436, 437 (CA6 1993); *United States* v. *Hamilton*, 19 F. 3d 350, 354-357 (CA7 1994); *Berrisford* v. *Wood*, 826 F. 2d 747, 751 (CA8 1987); *United States* v. *Williams*, 989 F. 2d 1061, 1068 (CA9 1993); *United States* v. *Taggart*, 944 F. 2d 837, 840 (CA11 1991); *State* v. *Wilson*, 918 P. 2d 826, 836-837 (Or. 1996); *People* v. *Dhue*, 506 N. W. 2d 505, 509 (Mich. 1993); *Harrison* v. *Commonwealth*, 858 S. W. 2d 172, 175-176 (Ky. 1993); *State* v. *Kiewert*, 605 A. 2d 1031, 1034-1035 (N.H. 1992); *People* v. *Moore*, 693 P. 2d 388, 390 (Colo. App. 1984); *State* v. *Hoak*, 692 P. 2d 1174, 1179-1180 (Idaho 1984) (admissible with "sufficient 'indicia of reliability' "; test not met in present case); *State* v. *Valladares*, 664 P. 2d 508, 511 (Wash. 1983); *Commonwealth* v. *Goldblum*, 447 A. 2d 234, 241-242 (Pa. 1982); *State* v. *Naas*, 409 So. 2d 535, 543, n. 2 (La. 1981).

Few jurisdictions have directly addressed whether the declaration against penal interest exception is firmly rooted enough to satisfy the Confrontation Clause. Some courts have avoided the issue, instead applying the second prong of *Roberts*' "particularized guarantees of trustworthiness" test. See, *e.g.*, *Wilson*, *supra*, 918 P. 2d, at 836-837; *Dhue*, *supra*, 506 N. W. 2d, at 511. Fortunately, other jurisdictions have been more direct, tackling the problem head on by holding that the penal interest exception is "firmly rooted," thus satisfying the Confrontation Clause. See, *e.g.*, *United States* v. *Katsougrakis*, 715 F. 2d 769, 776 (CA2 1983); *United States* v. *York*, 933 F. 2d 1343, 1363 (CA7 1991); *Berrisford*, *supra*, 826 F. 2d, at 751; see also *United States* v. *Seeley*, 892 F. 2d 1, 2 (CA1 1989) (Breyer, J.) ("the exception for declarations against penal interest would seem to be 'firmly rooted' ").

It is time for this Court to declare the penal interest exception firmly rooted under the *Roberts* rule. The constitutional waters are safe. The widespread acceptance of the penal interest exception, in both the federal rules and various state rules, and the almost equally widespread acceptance of its use as inculpatory evidence provide compelling justification for applying *Roberts*' first prong. Any doubts about the wisdom of declaring this exception firmly rooted vanish in light of the basic soundness of the rule; declarations that are truly against one's penal interest are highly likely to be truthful.

III. The Virginia Supreme Court's decision that Mark Lilly's statements qualify under the penal interest exception is reasonable.

The fact that a particular type of hearsay evidence can qualify as a firmly rooted exception under *Ohio* v. *Roberts*, 448 U. S. 56 (1980) does not end the inquiry. Courts still must decide whether the particular piece of evidence is fairly included within the firmly rooted exception. This inquiry can involve delicate balancing between the integrity of the confrontation right and the independence of local rules of evidence. If the interpretation of the *Roberts* exception is too expansive, then the integrity of the Confrontation Clause is threatened; a firmly rooted exception such as the penal interest rule cannot be a mere label slapped on any type of hearsay to render it immune from Confrontation Clause scrutiny. This concern, while important, should not be allowed to subvert *Roberts*' purpose of fostering in each jurisdiction "the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Id.*, at 64.

Virginia's interpretation of the penal interest exception should be allowed to qualify under the *Roberts* rule even if it may be broader than this Court's interpretation of the federal penal interest exception in *Williamson* v. *United States*, 512 U. S. 594 (1994). *Williamson* was a nonconstitutional decision; it recognized that a broader rule may be possible under the Confrontation Clause. See *id.*, at 600 ("Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements"). If

Williamson and other federal hearsay decisions are allowed to define the *Roberts* rule, then they would effectively become binding on the states as a matter of hearsay law, even if a state does not precisely follow the federal rules for its own law of evidence.[8]

As the final authority on federal questions, this Court may be "infallible" in the construction of the Federal Rules of Evidence. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the result). Such infallibility does not, however, extend to state evidence law.

> "However ill-advised would be the constitutionalization of hearsay rules in federal courts, the undesirability of imposing those brittle rules on the States is manifest. Given the ambulatory fortunes of the hearsay doctrine, evidenced by the disagreement among scholars over the value of excluding hearsay and the trend toward liberalization of the exceptions, it would be most unfortunate for this Court to limit the flexibility of the States and choke experimentation in this evolving area of the law." *California* v. *Green*, 399 U. S. 149, 184-185 (1970) (Harlan, J., concurring) (footnote omitted).

Lee v. *Illinois*, 476 U. S. 530 (1986) provides an example of what would be an improper application of the penal interest exception. The codefendant confession in that case was hopelessly compromised as a declaration against penal interest because the police gave the declarant an overwhelming motive to implicate his codefendant. When the police informed Thomas that Lee had implicated him, contrary to their previous agreement, he had a compelling emotional reason to avenge himself and a strong

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8. Under this scenario a state court could still theoretically admit hearsay that does not conform to this Court's interpretation of the federal rules under this Court's "particularized guarantees of trustworthiness" test. See, *e.g.*, *Lee* v. *Illinois*, 476 U. S. 530, 534 (1986). This option is less practical than it appears, due to the difficulty of satisfying this test. Evidence that does not come under a firmly rooted exception is deemed "*presumptively* unreliable, and inadmissable for Confrontation Clause purposes." *Ibid.* (emphasis added). Ease of administration and the risk of losing convictions to appellate reversal or collateral attack will give state trial courts considerable incentive to rigidly follow this Court's interpretation of the hearsay exceptions.

practical reason to spread the blame by incriminating the person who blamed him. See *supra*, at 11.

The present case does not fit the pattern of unreasonableness demonstrated in *Lee*. A key distinction between the two is that Mark Lilly was told by the interrogating officer that Barker and Lilly both stated that he did *not* commit the murder, the exact opposite of the scenario in *Lee*. See Brief for Petitioner 6. Besides Mark Lilly, there were three eyewitnesses to Alexander DeFilippis' murder: Gary Barker, defendant, DeFilippis himself. The best witness, DeFilippis, was, of course, dead. Once Mark Lilly had been informed that the two other potential witnesses against him had cleared him from any complicity for the actual killing, he was in the clear. Thus he had little to gain and potentially much to lose by answering any questions about the killing. This stands in sharp contrast to the vengeful, essentially exculpatory confession in *Lee*.[9]

The fact that Mark Lilly's declaration contains statements that do not inculpate him does not render its admission. Such statements provide a necessary context, aiding the trier of fact's understanding of the declaration.

> "Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy (§ 1457 *supra*), it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to *every fact contained in the same statement*." 5 J. Wigmore, Evidence § 1465, p. 339 (Chadbourn rev. 1974) (emphasis in original).

Such statements can, "subject to the constraints of the Confrontation Clause," be fairly included in the penal interest rule. See *Williamson*, *supra*, 512 U. S., at 600. Even if this Court does not construe the Federal Rules of Evidence to admit such contextual

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9. Motive also distinguishes this case from *Williamson*, *supra*. The declarant in that case was caught with a large quantity of cocaine with no apparent defense other than implicating a "bigger fish." See *Williamson*, *supra*, 512 U. S., at 604 (O'Connor, J.). His exoneration for the murder by his partners relieved Mark Lilly of the need to implicate others found in *Williamson*

S. Ct.hearsay as a matter of evidentiary law, this practice is not so unreasonable as to violate the Confrontation Clause.

Petitioner's attempt to bolster his case by attacking custodial confessions, see Brief for Petitioner 44-45, and n. 25, should not lead this Court to categorically exile these statements from the penal interest exception. Custodial confessions that survive the rigorous scrutiny of *Miranda* and the due process voluntariness requirement, see, *e.g.*, *Colorado* v. *Connelly*, 479 U. S. 157, 163 (1986), are vital to our criminal justice system.

> "Admissions of guilt resulting from *Miranda* waivers 'are more than merely "desirable" they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' " *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991) (citation omitted) (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)); see also *People* v. *Garner*, 57 Cal. 2d 135, 164, 367 P. 2d 680, 697 (1961) (Traynor, J., concurring) ("So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation").

Although the constitutionality of the declarant's interrogation is not dispositive of the Confrontation Clause issue, see *Lee*, *supra*, 476 U. S., at 544, it does place the custodial statement in a better light than it would have without the benefit of these protections, a fact that deserves consideration in favor of admitting custodial confessions under the penal interest exception.[10] Indeed, the police interrogator in the present case provided a key element in support of the reliability of Mark Lilly's statement—the knowledge that he had not been blamed by either of his companions.

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10. *Lee*'s broad disavowal of any relationship between voluntariness and reliability must be read in light of the extremely strong motives for blame spreading found in that case. See *supra*, at 11. While it is true that the voluntariness requirement serves more purposes than ensuring the reliability of verdicts, see *Connelly*, *supra*, 479 U. S., at 168, it is no less true that "an involuntary confession is inadmissible in part because such a confession is likely to be unreliable . . . ." *Watkins* v. *Sowders*, 449 U. S. 341, 347 (1981). While not dispositive, voluntariness will have at least some positive bearing on the statement's reliability.

The Confrontation Clause is interpreted to insure that the government's case against the defendant is based upon the truth. Admitting declarations against penal interest against defendants is consistent with this goal. The risk of any confession is sufficiently strong to make any suspect think twice before confessing, even if the confession also implicates another. The decision of the Virginia Supreme Court to uphold the admission of Mark Lilly's statement under this firmly rooted exception was a reasonable one.

CONCLUSION

The decision of the Virginia Supreme Court should be affirmed.

February, 1999

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